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Supreme Court of the United States

October Term, 1963

RAFAEL CRUZ,

Defendant-Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

	PAGE
STATEMENT	1
INTRODUCTION	2
QUESTION PRESENTED	3
POINT I—The motion to suppress the introduction of the knife (Exh. 6) and the handbag (Exh. 5) into evidence was properly denied	
A. The search was reasonable as an incident of a lawful arrest	4
B. The search was lawful in that consent was validly obtained to conduct the search	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:

Agnello v. United States, 269 U. S. 20 (1925) 4

Brinegar v. United States, 338 U. S. 160 (1949) 7

Clark v. State, 78 Okl. Cr. 423 (1944)
Cradle v. United States, 178 F. 2d 962 (1949), cert. denied 339 U. S. 929 (1949). 7

Ellison v. United States, 206 F. 2d 476 (D. C. Cir. 1953)

PAGE

Hester v. United States, 265 U. S. 57 (1924) .....

Hoke v. United States, 208 F. 2d 916 (8th Cir. 1953) .....

[illegible] v. Commonwealth, [illegible] Ky. 518 (1934) .....

Knight v. State, 171 Ark. 882 (1926) .....

People v. Boyles, 45 Cal. 2d 652 (1955) .....

People v. Brown, 147 Cal. App. 2d 852 (1957) .....

People v. De Oore, 242 N. Y. 13 (1926) .....

People v. Jones, 252 N. Y. S. 2d 18 (1962) .....

People v. Kortwright, 236 N. Y. S. 2d 385 (N. Y. C. 1962) .....

People v. Lane, 10 N. Y. 2d 347 (1961) .....

People v. Martin, 45 Cal. 2d 755 (1955) .....

Shoquosky v. Simon, 45 Cal. App. 2d 645 (1955) .....

Rios v. United States, 364 U. S. 253 (1960) .....

State v. McDaniel, 145 Ore. 187 (1925) .....

State v. Reynolds, 101 Conn. 224 (1924) .....

State v. Rotolo, 30 Wyo. 481 (1928) .....

United States v. Di Re, 332 U. S. 581 (1948) .....

United States v. Dornblut, 261 F. 2d 546 (2d Cir. 1958) .....

United States v. Lee, 274 U. S. 559 (1927) .....

United States v. Maffin, 156 F. Supp. 262 (S. D. N. Y. 1957) .....

United States v. Rabinowitz, 339 U. S. 56 (1946) .....

Other Authorities:

New York Code of Criminal Procedure:

Sect. 177 .....

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Statement

This is a petition for a writ of certiorari to the New York State Court of Appeals to review a decision of that Court, rendered February 21, 1963, unanimously affirming, without opinion, a judgment of the Court of General Sessions, New York County (Culkin, J. and a jury) entered March 21, 1962, convicting the petitioner of the crime of Murder in the First Degree, and sentencing him, absent a jury recommendation for life imprisonment, to the punishment of death.

Introduction

In the dark hours of early morning, July 16, 1961, Lo Pen, a shadow victim aged 58 or 59, was returning home when he was accosted by a trio of armed robbers lurking in the hallway, and, upon his scream of "robbery," he was murdered by the single thrust of a knife deep into his heart. Both Carmen Reyes and Wilfredo "Bolo" Reyes pleaded guilty (1229), and the participation of the defendant Rafael Cruz in the killing was established by evidence so overwhelming that its weight was not even challenged on appeal.

The presence of these three at the murder scene was attested to by the eye-witness observations of Jim Ching, who identified the defendant as being at the scene of the crime (436), and corroborated by the report of an abortive attack about ten minutes earlier on Wong Sim at the same premises. Further means of identification was provided by the black-and white handbag of Carmen Reyes which was noticed by Jim Ching (519-20, 641-3), and subsequently found bearing blood stains in the room occupied by the defendant and his mistress.

Hector "Cura" Mateo testified to admissions of complicity made to him by the defendant immediately following the crime (564, 1154). Moreover, the act of the defendant in changing from a bloody shirt to a clean one specifically to avoid detection further demonstrates his awareness of guilt (573, 1154-3).

And finally there is the complete confession of the defendant, incorporated into a written statement, which de-

Reference, unless otherwise indicated, is to pages of the trial.

tails the crime from its conception in a bar to its consummation in the apartment house (1117-64). The confession discloses the conspirators' decision to "take a chink," and the development of a plan wherein Carmen Reyes was to gain entrance to an apartment by soliciting a victim with an offer of a sexual liaison, and while one man served as look-out, the other would rob the victim. Although initially frustrated by the caution of the apartment's occupant, the trio remained in the hallway to rob whoever might be so unfortunate as to come upon them. When the lone Chinese, Lo Pen, entered the building and climbed the stairs, he was marked as the victim. Carmen Reyes accosted him, he screamed, "Robbery" and was stabbed to death.

Question Presented

Whether the search of the petitioner's apartment and the seizure of a knife and a handbag therefrom violated the Fourth Amendment of the United States Constitution in that it was neither incident to a valid arrest nor based on voluntary consent.

POINT I

The motion to suppress the introduction of the knife (Exh. 6) and the handbag (Exh. 5) into evidence was properly denied [answering petitioner's Point I, pp: 6-18].

A. The search was reasonable as an incident of a lawful arrest.

Although the police had no warrant to search the petitioner's premises, apartment 13 at 81 Allen Street, it is clear that such a warrant is not an essential prerequisite of a lawful search. The courts have long recognized that a search may be constitutionally performed without a warrant as an incident of a lawful arrest [*United States* v. *Rabinowitz*, 339 U. S. 56 (1949); *Amiello* v. *United States*, 269 U. S. 20 (1925); *People* v. *Lane*, 10 N. Y. 2d 347 (1961); *People* v. *Defore*, 242 N. Y. 13 (1926)], and this Court has ruled that the legality of an arrest is determined by reference to state law [*United States* v. *Di Re*, 332 U. S. 581 (1948)].

In New York, Section 177 of the Code of Criminal Procedure furnishes the criteria of a lawful arrest. It provides *inter alia*:

> "A peace officer may, without a warrant, arrest a person,
>
> * * *
>
> "3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it;
>
> "4. When he has reasonable cause for believing that a felony has been committed, and that the person arrested has committed it; * * *"

In *People v. Lane* [10 N. Y. 2d 347 (1961)] New York adopted the classic definition of probable cause first promulgated by Chief Justice Marshall.

> "[T]he term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation . . . It imports a seizure made under circumstances which warrant suspicion" [at p. 353].

Here, an analysis of the facts and circumstances within the knowledge of the police inevitably leads to the conclusion that the arrest of the defendant and the search of his premises were justified. First, of course, the police were aware of the commission of the crimes. Jim Ching had informed Detective Furst of the presence of three Puerto Ricans in the hallway moments before the murder. He gave the officer a description of a girl with long, black hair, and told of the black and white pocketbook which she carried, as well as describing one of her male accomplices (335, 337, 348-50). To this was added the account of the assault on Wong Sim as related to Detective Ihle. Wong Sim's description of the three Puerto Ricans, one of whom was a female with long black hair, coupled with the time and place of the attack, clearly placed these conspirators on the scene (328-30).

When Patrolman Ihle arrived at the scene of the crime and heard the information in Detective Furst's possession, he recalled that on July 14, two nights before, a Puerto Rican girl with long black hair complained of her lover who was quick to use a knife as means of persuasion or to settle a dispute (318-26, 350-9). By 7:15 a.m. on July 16, the police ascertained that the defendant and Carmen Reyes had just returned to their apartment, or, in other words, that they had not been home at the time the crime was committed or for several hours thereafter (334-8, 359-61).

Certainly at this point the police had a clear duty to investigate the whereabouts of the suspects, and in pursuance of their right to investigate they approached the door of apartment 13."

Detective Furst announced his authority (281, 361) and the door was opened by a Puerto Rican girl with long black hair. But more important, when the door opened the inside of the room was partially visible, and there, in open view, was a black and white pocketbook fitting the description given by Jim Ching (362-3; 365). The girl told the officers to "come in" (281-2, 339, 362) and further made clear her acquiescence by returning to bed and leaving the door open (362). Upon being invited inside, Detective Furst proceeded to question Carmen Reyes.

> "I said 'Is this your pocketbook?' She said, 'Yes.' I said 'Did you have this pocketbook with you tonight?' She said 'Yes'. And as I examined the pocketbook, I saw what appeared to be blood stains, and I asked her, I said, 'Carmen, why are these stains on the pocketbook?' She said she didn't know." (366).

At this point there had been no search. The pocketbook was in open view, and the blood stains were clearly visible to the naked eye. Such observations do not constitute a search and no probable cause is needed to effect the right of the police to investigate [*Rios* v. *United States*, 364 U. S. 253 (1960)].

An analogous situation is presented in *Ellison* v. *United States* [206 F. 2d 476 (D. C. Cir. 1953)]. There, officers suspecting the appellant of committing robbery, rang the doorbell to inquire into his whereabouts. While awaiting an answer, they observed the fruits of the crime in plain view through the open door. The court rejected the contention that the presence of the officers at the open door and the subsequent sighting of the contraband constituted

an illegal entry. The court observed that the police were present in furtherance of their right to investigate, and were not required to turn their heads when evidence was fortuitously presented to their inquiring eyes. [To the same effect, see *Hester v. United States*, 265 U. S. 57 (1924); *United States v. Lee*, 274 U. S. 559 (1927); *Cradle v. United States*, 178 F. 2d 962 (1949), cert. denied 339 U. S. 929 (1949).]

Everything observed by the officers dovetailed nearly with the eye witness account of Jim Ching, and the unexplained blood stains on the black and white pocketbook pointed to complicity in the recently committed crime. While such combination of facts and circumstances may not be sufficient to convict, that standard is not required to arrest or search (*Brinegar v. United States*, 338 U. S. 160 (1949)), and all the facts taken together clearly established that, at that point, suspicion was warranted and accordingly the police had probable cause to search the apartment or arrest the occupant.

Furthermore, the search which subsequently unearthed the murder weapon is not vitiated by the technicality that no arrest was first consummated. While evidence discovered by a search may not be used to validate an otherwise unlawful arrest, such search does not tell when probable cause to arrest existed before the search, regardless of whether the arrest was in fact performed first. In *People v. Simon*, 145 Cal. App. 2d 645 (1955)], the court, after extensively reviewing both Federal and California authority, concluded:

> "Thus if an officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested . . . there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest.

In either case the important considerations are whether the officer had reasonable cause before the search to make an arrest and whether the search and any seizures incident thereto were or were not more extensive than would reasonably be justified as incident to an arrest [see U.S. v. Rabinowitz, 339 U. S. 56, 60-64 (1950)]. We conclude, therefore, that a search is not unlawful merely because it precedes rather than follows the arrest."

[To the same effect, see, *People v. Johns*, 232 N. Y. S. 2d 1 (1962); *People v. Brocco*, 147 Cal. App. 2d 352 (1957); *People v. Martin*, 45 Cal. 2d 755 (1955); *People v. Bowles*, 45 Cal. 2d 652 (1955); *Clark v. State*, 78 Okl. Cr. 423 (1944); *State v. Ratolo*, 39 Wyo. 181 (1928); *Knight v. State*, 171 Ark. 882 (1926); *State v. McDaniel*, 115 Ore. 187 (1925); *State v. Reynolds*, 101 Conn. 224 (1924); *Inale v. Commonwealth*, 204 Ky. 518 (1924)].

In the present instance, the arrest was no pretense for a search, it in no way depended upon the product of the search, and was, in the strictest sense, contemporaneous. The entry of the police was solely to place the defendants under custody and the finding of the weapon prior to the imposition of actual physical restraint was the merest temporal fortuity.

Under the circumstances, the conduct of the police was entirely reasonable and therefore not proscribed by the Fourth Amendment of the United States Constitution. The police were reasonable in their initial suspicion of the defendant and his cohorts; they were reasonable in attempting to locate him for questioning; reasonable in thinking their suspicions confirmed by the pocketbook and its unexplained telltale blood smears seen on the premises; and reasonable in conducting a search of the apartment when their suspicions matured into probable cause to believe that the occupants perpetrated the crime which afforded grounds for arrest.

B. The search was lawful in that consent was validly obtained to conduct the search.

In addition to justification as an incident to a lawful arrest, it is clear that the consent of the occupants was validly obtained to authorize the inspection of the apartment. The question of whether consent was voluntarily given is one of fact which is to be decided by the weight of the evidence [*United States* v. *Dornblut*, 261 F. 2d 946 (2d Cir. 1958); *United States* v. *Martin*, 176 F. Supp. 262 (S. D. N. Y. 1959); *People* v. *Kortwright*, 236 N. Y. S. 2d 85 (N. Y. Co. 1962)]. In the present case there is no conflict in testimony. Detective Furst was invited into the apartment by Carmen Reyes after he had stated his authority (361), and he proceeded to question her about the blood-smeared handbag which he observed through the open door. She could not explain this inculpatory item (366) and, apparently to allay the suspicions of the police,

> "Cruz said, 'You know, what's the matter? We didn't do anything wrong. You want to search the place?' And then Carmen said, 'Yeah, go ahead and search the place.'" (366).

The appellant apparently contends that coercion should be implied merely from the presence of five police officers at the door. Yet no such conclusive inference vitiates consent freely given. While courts are rightfully hesitant to deem consent voluntary under such circumstances, an operable invitation to investigate may be tendered to law officers where the occupant has no reason to fear the outcome and may, indeed, expect vindication [see, *Hoxie* v. *United States*, 208 F. 2d 916 (8th Cir. 1953); *United States* v. *Dornblut*, *supra*; *People* v. *Kortwright*, *supra*]. That was the situation when the appellant and his paramour invited police inspection. The defendant had no way of knowing

that he was a prime suspect. He did not know that Jim Ching observed Carmen Reyes and her handbag through his peephole, or that Wong Sim could also furnish a description of Carmen Reyes, or that Patrolman Ihle would be on the case and connect the events of July 14 with the murder. And when Carmen Reyes could not explain the blood stains on the handbag, they both sought to divert the suspicions of the police by consenting to a search. The pocketbook had already been discovered, and they could not know that the knife which was subsequently found would incriminate them, since it had been previously washed of blood (947, 1140-1) and would appear to be an ordinary knife. In fact, it was only through the subsequent admission of Rafael Cruz that the knife was identified as the murder weapon (948; 1143). Even expert laboratory examination could not establish it to be the death weapon (677).

Thus, it was entirely logical to find that consent was voluntarily and freely given, and the trial court in hearing the facts was correct in its estimation of them.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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